NO. 47299-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

DAVID ALLEN TROUPE, JR.,

Petitioner.

RESPONDENT'S SUPPLEMENTAL RESPONSE REGARDING MOTION TO REVOKE PETITIONER'S FILING FEE

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I. INTRODUCTION

Troupe argues RCW 4.24.430 does not apply to his Personal Restraint Petition (PRP) because this Court has inherent authority to waive fees, that inherent authority is only constrained in personal restraint petition proceedings by RCW 7.36.250, and application of RCW 4.24.430 to personal restraint petitions would violate due process and equal protection. None of these arguments demonstrate that RCW 4.24.430 does not apply in this case.

The Legislature can constrain a court's inherent authority to waive fees in cases involving the State because the constitution authorizes the Legislature to determine how and when the State may be sued. Therefore, the Legislature can decide that a person with three or more prior frivolous actions cannot obtain a waiver of fees in a suit against the State except in narrow circumstances. Under the basic constitutional framework, RCW 4.24.430 is a valid constraint on a court's authority to waive fees in suits against the State. Troupe cannot overcome this authority by merely pointing to this Court's inherent authority.

Contrary to Troupe's assertions, both RCW 7.36.250 and RCW 4.24.430 apply to his PRP. The first statute governs generally in all cases involving habeas corpus relief, and the second statute applies in the subset

of cases where a petitioner seeking habeas relief has litigated three or more prior frivolous cases.

Finally, application of RCW 4.24.430 does not violate due process and equal protection. As the federal courts have ruled in considering similar federal statutes, the statutory limitation on the waiver of fees is a valid restriction intended to curb vexatious litigation.

II. ARGUMENT

A. RCW 4.24.430 Is A Valid Constraint On The Court's Inherent Authority To Waive Filing Fees

Troupe first argues he is entitled to a waiver of fees simply because this Court has inherent authority to waive fees for indigent litigants. Supp. Brief, at 1 (citing *Jafar v. Webb*, 177 Wn.2d 520, 531, 303 P.3d 1042 (2013); *O'Connor v. Matzdorff*, 76 Wn.2d 589, 600, 458 P.2d 154 (1969)). A court's inherent authority to waive fees is not sufficient to overcome RCW 4.24.430. Under the State Constitution, the statute is a valid constraint on a court's inherent authority in cases brought against the State.

Article II, section 26 of the Washington Constitution provides that, "The legislature shall direct by law, in what manner, and in what courts, suit may be brought against the state." *McDevitt v. Harbor View Med. Ctr.,* 179 Wn.2d 59, 64-65, 316 P.3d 469, 471 (2013) (quoting Wash.

Const. Art. II, § 26). In *McDevitt,* the Supreme Court reaffirmed that this constitutional provision authorizes the Legislature to establish conditions precedent for suits brought against the State. *McDevitt,* 179 Wn.2d at 62-63. The court reached this conclusion even though it previously held that the medical malpractice pre-notification requirement of RCW 7.70.100 was unconstitutional in a suit between private individuals because it conflicted with the judiciary's inherent power to set court procedures. *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010). But when the statutory requirement was applied in suits against the State, the statutory condition was a valid restriction on a court's authority because the Legislature can determine when and how the State is sued. *McDevitt*, 179 Wn.2d at 76. "[T]he 90 day presuit notice requirement is constitutional as applied against the State on the grounds that the Legislature may establish conditions precedent, including presuit notice requirements." *Id.* at 63.

The provisions of RCW 4.24.430 similarly involve how a suit can be brought against the State and are thus governed by Article II, section 26 of the Washington Constitution. Given that constitutional authority and the *McDevitt* ruling, this Court should hold that the statute constrains a court's inherent authority to waive fees in cases against the State.

Troupe's arguments confirm this view. Although he disagrees as to the applicable statute, Troupe recognizes this Court's authority to waive

fees can be constrained by statute. Supp. Brief at 2 (arguing the Court may waive fees if the petitioner satisfies the statutory "good faith" standard of RCW 7.36.250). Troupe, however, incorrectly analyzes the statutes to argue that only RCW 7.36.250 applies, to the exclusion of the three strikes provision of RCW 4.24.430. But as discussed next, both statutes apply in this proceeding.

B. Both RCW 4.24.430 And RCW 7.36.250 Apply To Personal Restraint Petitions

Troupe argues that under RAP 16.8, RCW 7.36.250 is the only statute governing the waiver of fees in a personal restraint petition proceeding. But RAP 16.8 does not limit itself to RCW 7.36.250, and the language of the rule does not preclude the application of RCW 4.24.430. In fact, the rule does not expressly cite to either statute. The rule provides:

> (a) Filing Fee. A personal restraint petition will be filed by the clerk of the appellate court only if the statutory filing fee is paid, unless the appellate court determines that the petitioner is indigent. The statute governing payment of a fee for filing a petition for writ of habeas corpus is controlling.

RAP 16.8(a).

When determining whether a statute conflicts with a court rule, the Court should first attempt to harmonize them and give effect to both. *State v. Gresham,* 173 Wn.2d 405, 428-29, 269 P.3d 207 (2012). Here, nothing in RAP 16.8 specifically indicates that only RCW 7.36.250 applies, and

nothing in the rule prohibits or conflicts with application of RCW 4.24.430.

The more reasonable interpretation of the general statements in the rule is that it allows application of both statutes in personal restraint petition cases. This interpretation is also supported by other provisions in the Court's rules governing personal restraint petitions. *See* RAP 16.15(h) (allowing the Court to waive expenses for indigent petitioners in the appellate courts, but declaring the "Statutes providing for payment of expenses with public funds are not superseded."). Read according to its plain language, there is no conflict between RAP 16.8 and RCW 4.24.430. The rule does not preclude application of the statute.

Similarly, the two statutes do not conflict with each other. RCW 7.36.250 applies generally to all petitions for habeas corpus relief. The statute provides that the Court "may" waive fees when the petition is taken in "good faith." RCW 7.36.250. "The term 'may' in a statute generally confers discretion." *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). Thus, under RCW 7.36.250, the Court may waive fees in cases taken under good faith. RCW 4.24.430 then has a narrower, more specific application to vexatious and frivolous litigators. It provides that the Court "shall deny the request for waiver of the court filing fees" if the petitioner has litigated three or more frivolous actions. RCW 4.24.430.

Thus, while RCW 7.36.250 provides that the Court generally may waive fees when the petition is taken in good faith, RCW 4.24.430 provides that the Court shall deny such a waiver in the narrow circumstances where the petitioner has three or more prior frivolous cases. *See State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) ("the word 'shall' is presumptively imperative and operates to create a duty rather than conferring discretion".). These two statutes do not conflict.

Moreover, if the Court were to find that RAP 16.8 (or GR 34) are in conflict with RCW 4.24.430, the provisions of RCW 4.24.430 should still control because the legislature has the constitutional authority to direct the manner in which suits are brought against the state. *McDevitt,* 179 Wn.2d at 62-65. Under either approach, RCW 4.24.430 must be applied to the petitioner in this case.

C. Petitioner's Claim That Personal Restraint Petitions Are Not Contemplated By RCA 4.24.430 Is Contradicted By The Plain Language Of The Statute And Binding Precedent

Mr. Troupe also claims that the plain language of RCW 4.24.430 demonstrates that it does not apply to personal restraint petitions. Supp. Brief at 3-4. His argument is unsound.

This Court must start with the presumption that [t]he Legislature is presumed to be aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision the

court will not overrule clear precedent interpreting the same statutory language". *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 352, 217 P.3d 1172, 1177 (2009) (internal quotations omitted). Consequently, when the Legislature enacted RCW 4.24.430 in 2011, it is presumed to have known prior judicial holdings regarding the language that was used in that statute.

For many years, binding precedent has established that a personal restraint petition is a civil action. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 409, 972 P.2d 1250, 1267 (1999), *as amended* (June 30, 1999) ("It is well-settled a personal restraint petition is a civil matter".); s*ee also In re Pers. Restraint Petition of Lord,* 123 Wn.2d 737, 739, 870 P.2d 964, 966 n.2 (1994) ("a PRP is a civil procedure"); *State v. LaBeur*, 33 Wn. App. 762, 764, 657 P.2d 802, 804 (1983) (personal restraint petition is a collateral attack in a civil proceeding). And RCW 4.24.430 clearly states that it applies to "any *civil action* or appeal against the state" where a person serving a criminal sentence seeks leave to proceed in state court without payment of a filing fee. (*Emphasis supplied.*) Accordingly, because the precedents in *Gentry*, *Lord*, and *LaBeur* all predate the enactment of RCW 4.24.430 in 2011, the statute should be interpreted to include PRPs within the meaning of the term "civil action."

This interpretation is confirmed by the exceptions provided in RCW 4.24.430, which make sense only if the statute applies to personal restraint petitions. RCW 4.24.430 specifically excludes matters that are a subset of PRPs – the PRPs that challenge the duration of a prisoner's confinement. The statute exempts civil actions "that, if successful, would affect the duration of the person's confinement …." RCW 4.24.430. Such actions describe a PRP filed by a criminal defendant that challenges the validity of the conviction, the validity of the sentence imposed by the superior court, or a prison disciplinary sanction involving the loss of good time credit. In contrast, a PRP that challenges only conditions of confinement is a civil action that would not, if successful, affect the duration of the petitioner's confinement. Thus, the type of civil action filed by Mr. Troupe is not exempted from the statute. Rather, it is necessarily included within the meaning of a civil action under RCW 4.24.430.

"Our fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature". *In re Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011). "We determine the intent of the legislature primarily from the statutory language". *Id.* In the absence of ambiguity, we will give effect to the plain meaning of the statutory language." *Id.* "Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is

found, related provisions, and the statutory scheme as a whole". *Lake v. Woodcreek Homeowners Ass'n.*, 169 Wn.2d 516, 526, 243 P.3d 1283, 1288 (2010). Here, the statutory language demonstrates that the Legislature knew and intended RCW 4.24.430 to apply to PRP actions, except for PRP actions that fall in the specified exceptions.

D. Application Of RCW 4.24.430 Does Not Violate Due Process Or Equal Protection

Mr. Troupe argues that application of RCW 4.24.430 would violate due process and equal protection because it "would deprive the Petitioner of his only mechanism for challenging the conditions of his confinement". Supp. Brief at 7 (quoting Commissioner's Ruling). But the limited restriction imposed by the statute to curb vexatious litigation does not violate either due process or equal protection.

The Prison Litigation Reform Act (PLRA) is the federal counterpart to RCW 4.24.430. *See* 28 U.S.C. § 1915. Like RCW 4.24.430, the PLRA prevents federal courts from waiving filing fees if an inmate has filed three or more frivolous civil actions or appeals. 28 U.S.C. § 1915 ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the

United States that was dismissed on the grounds that it is frivolous ....").

The Ninth Circuit has squarely addressed and rejected the same legal access claim being made by Mr. Troupe. *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999). The *Rodriguez* Court explained that:

> § 1915(g) does not infringe upon an inmate's meaningful access to the courts. Section 1915(g) does not prohibit prisoners from accessing the courts to protect their rights. Inmates are still able to file claims-they are only required to pay for filing those claims.
> . . . .
>
> Moreover, § 1915(g) does not prevent all prisoners from accessing the courts; it only precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status. Although prisoners are entitled to meaningful access to the courts, courts are not obliged to be a playground where prisoners with nothing better to do continuously file frivolous claims. Only after demonstrating an inability to function within the judicial system is an indigent inmate asked to pay for access to the courts.

Id.; see also Ball v. Famiglio, 726 F.3d 448, 452 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 1547, 188 L. Ed. 2d 565 (2014) ("§ 1915(g) does not block a prisoner's access to the federal courts. It only denies the prisoner the privilege of filing before he has acquired the necessary filing fee."). The reasoning in *Rodriguez* applies equally to Mr. Troupe's challenge to RCW 4.24.430. Mr. Troupe is not deprived of his ability to file conditions

of confinement PRP actions; he simply must pay his filing fees in order to do so.

Mr. Troupe also argues that due process and equal protection require a complete waiver of filing fees. Supp. Brief at 7. But the case cited for that proposition, *Jafar v. Webb*, 177 Wn.2d 520, 530, 303 P.3d 1042, 1047 (2013), expressly declined to hold that the constitution required waiver of filing fees in that case because the court found that GR 34 provided greater protections than the constitutional floor. *Jafar*, 177 Wn.2d at 530. Here, GR 34 is not at issue. Rather, the constitutionality of RCW 4.24.430 as applied to PRPs is being challenged. Therefore, this Court should analyze the statute under relevant constitutionally based decisions, not *Jafar's* interpretation of GR 34.

For example, in *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973), the Supreme Court analyzed whether state provisions requiring the payment of filing fees were unconstitutional under the due process and equal protection clauses of the federal constitution. The *Kras* Court clarified that a constitutional requirement to waive court fees in civil cases is the exception, not the general rule. *Id.* at 445-49. There is only a narrow category of civil cases in which the State must provide access to its judicial processes

without regard to a party's ability to pay court fees. *M.L.B. v. S.L.J.*, 519 U.S. 102, 113, 117 S. Ct. 555, 563, 136 L. Ed. 2d 473 (1996). Those cases include only instances where the courts have found a "fundamental interest" such as the right to terminate a marriage. *Id.* at 115.

In *Rodriguez* the Ninth Circuit addressed an equal protection challenge to the constitutionality of the "three strikes" provision of the PLRA. *Rodriguez*, 169 F.3d at 1178-79. It reasoned that to address the equal protection claim, it must decide the level of scrutiny. *Id.* at 1179. The strict scrutiny standard applies only if the legislation discriminates against a suspect class or infringes upon a fundamental right. *Id.* (Citing *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)). Further, a classification is presumed constitutional unless it is based upon a suspect classification or impinges upon a fundamental right. *Id.*

Here, it is well established that indigent prisoners are not a suspect class. *See Harris v. McRae*, 448 U.S. 297, 323, 100 S. Ct. 2671, 2691, 65 L. Ed. 2d 784 (1980) (indigent persons are not a suspect class); *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir.1998) (prisoners are not a suspect class); *Tucker v. Branker*, 142 F.3d 1294 (D.C. Cir. 1998) (indigent prisoners are not a suspect class). Further as stated in

Rodriguez, because [the "three strikes" provision] in § 1915(g) does not infringe upon prisoners' fundamental rights and indigent prisoners are not a suspect class, the three-strike rule need only satisfy a rational basis test. Finding that the three-strike rule was enacted to curtail the extraordinary costs of frivolous prisoner's suits and minimize such costs to the taxpayers, it satisfied the rational basis test. *Rodriguez,* 169 F.3d at 1180-81.

Federal Courts have also found that the "three strikes" provision of the PLRA does not violate the Due Process clause. In *Carson v. Johnson,* 112 F.3d 818, 821 (5th Cir.1997), the Fifth Circuit held that the three-strike rule does not violate the Fifth Amendment due process clause because it does not prohibit prisoners from filing a lawsuit, it only denies them IFP status. Likewise, in *Rivera v. Allin,* 144 F.3d 719, 723–24 (11th Cir.1998), the Eleventh Circuit held that IFP status is a privilege, not a right, and that § 1915(g) does not unconstitutionally burden a prisoner's access to the courts. Significantly, the United States Supreme Court has at times prospectively denied IFP status to prisoners filing for writs of certiorari because those prisoners had filed numerous frivolous writs. *See Shieh v. Kakita,* 517 U.S. 343, 343–44, 116 S. Ct. 1311, 134 L. Ed. 2d 464 (1996)*; Martin v. District of Columbia Court of Appeals,* 506 U.S. 1, 2, 113 S. Ct. 397, 121 L. Ed. 2d 305 (1992)*; In*

re McDonald, 489 U.S. 180, 109 S. Ct. 993, 994, 103 L. Ed. 2d 158 (1989).

The State respectfully requests that this Court apply the same reasoning as that applied in federal jurisprudence and find that Mr. Troupe's equal protection and due process claims fail as a matter of law.

III. CONCLUSION

The requirements of RCW 4.24.430 have been met and the Petitioner is not entitled to a waiver of the filing fee in this matter. RCW 4.24.430 is constitutional as applied to PRPs. Therefore, the Respondent respectfully requests the Court grant its Motion to Modify the Commissioner's Ruling on its Motion to Revoke and order the Petitioner to pay his filing fee.

RESPECTFULLY SUBMITTED this 21st day of December, 2015.

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EXECUTED this 21st day of December, 2015, at Olympia, WA.

s/ Cherrie Melby
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